Supreme Court, U. S.
FILED
AUG 10 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979

No. 79-219

RUSSELL MORTON BROWN,
Respondent,

vs.

EDWARD O. LAMB, *et al.*,
Petitioners.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio and the Ohio Court of Appeals for the Sixth District

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Supreme Court of the United States

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RUSSELL MORTON BROWN,
Respondent,

VS.

EDWARD O. LAMB, *et al.*,
Petitioners.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Ohio and the Ohio Court of Appeals for the Sixth District

Petitioners pray that a Writ of Certiorari issue to review:

(1) The Judgment of the Supreme Court of Ohio entered in the above-captioned case on May 18, 1979, wherein it dismissed Petitioners' appeal, stating that there was no substantial constitutional question involved, and the accompanying Order which overruled Petitioners' Motion for an Order to the Ohio Court of Appeals to certify its record;

(2) The Judgment of the Ohio Court of Appeals of Lucas County, Ohio, wherein that Court dismissed Petitioners' appeal from the Court of Common Pleas of Lucas County, Ohio, and

(3) The denial by that Common Pleas Court, by its Orders of October 6 and 25, 1978 (A20 and A25), of Full Faith and Credit to the final judgment n.o.v. in favor of Petitioners entered by the United States District Court for the District of Columbia on December 22, 1967.

The ground for this Petition is that the Common Pleas Court of Lucas County, Ohio has incorrectly decided an important question of federal constitutional law, which has not been and can only be settled by this Supreme Court, and the Ohio Court of Appeals and the Ohio Supreme Court have both unjustifiably refused to review that decision.

OPINIONS BELOW

Neither the Supreme Court of Ohio nor the Ohio Court of Appeals wrote an opinion in this case. Each dismissed Petitioners' appeal. These judgments of dismissal are reprinted in the Appendix to this Petition at pages A1, A2 and A3, respectively.

The two opinions of the Common Pleas Court of Lucas County, Ohio are unreported. They are printed in the Appendix to this Petition at pages A6 and A18.

The Common Pleas Court Journal Entries denying Petitioners' Motion for Summary Judgment and their right to Full Faith and Credit were entered October 6 and 25, 1978 and are reprinted in the Appendix at pages A20 and A22.

JURISDICTION

Jurisdiction of this Supreme Court to hear this appeal is based on 28 U.S.C. §1257(3), because the Ohio courts

have denied Petitioners' constitutional and statutory right to full faith and credit for a prior out-of-state judgment in favor of the Petitioners on exactly the same claim for relief and cause of action asserted in the present case.

In Ohio, this judgment is pleaded as a defense, but the Ohio courts have denied it "the same full faith and credit" as it has by the law and usage of the jurisdiction from which it was taken, i.e., the United States District Court for the District of Columbia. In other words, the Ohio courts have refused to recognize that it is the *effect* of the judgment of the United States District Court for the District of Columbia, and not the *grounds* upon which that judgment was based, that must be given full faith and credit in the State of Ohio.

The judgments and decrees sought to be reviewed here are:

1. The judgments of the Ohio Supreme Court, dismissing Petitioners' appeal on the basis that no substantial constitutional question exists in this case, and denying Petitioners' motion for an Order to the Ohio Court of Appeals to certify its record, which were entered May 18, 1979 (A1 and A2, respectively);

2. The judgment of the Court of Appeals of Lucas County, Ohio, dismissing Petitioners' appeal from the Court of Common Pleas of Lucas County, Ohio, which was entered on January 11, 1979 (A3) and its denial of Petitioners' application for reconsideration which was entered on February 2, 1979 (A4); and

3. The Journal Entries of the Court of Common Pleas of Lucas County, Ohio, denying Petitioners' Motion for Summary Judgment and their right to full faith and credit, which were entered on October 6 and October 25, 1978 (A20 and A22).

QUESTION PRESENTED

Respondent filed identical suits against Petitioners, Lamb, et al., in Ohio in 1959 and in the District of Columbia in 1963. He dropped the Ohio case and prosecuted the District of Columbia case, and on December 22, 1967 after a full trial, judgment n.o.v. for Petitioners and against Respondent was entered by the District of Columbia court[1] (A25).

Nevertheless, Respondent resumed prosecution of the Ohio case, and the Ohio courts have refused full faith and credit to the District of Columbia judgment.

The questions presented for review by this Petition, stated affirmatively are:

1. The constitutional right of full faith and credit entitles a final judgment of the United States District Court for the District of Columbia, which precludes further litigation on the same claim between the same parties in that jurisdiction, to the same fully preclusive effect in the courts of every state of the United States. *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943).

2. Where the Ohio Trial Court finds no genuine issue as to any material fact but still denies full faith and credit to a final, fully-litigated District of Columbia judgment in favor of Petitioners and orders retrial of the same cause of action, substantial federal constitutional rights are abridged, and retrial would deny and defeat Petitioners' right of full faith and credit to the District of Columbia Judgment. U. S. Const., Art. IV, Sec. 1, 28 U.S.C. §1738.

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1. *Affirmed,* 414 F.2d 1210 (D.C. Cir. 1969), *cert. denied* 397 U.S. 907 (1970).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., Art. IV, Sec. 1 [Full Faith and Credit].

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. VI, Cl. 2 [Supreme Law of the Land].

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

28 U.S.C. § 1738 [Full Faith and Credit].

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have *the same full faith and credit* in every court within the United

States and its Territories and Possessions *as they have by law or usage in the courts of such State, Territory or Possession from which they are taken* (emphasis added).

STATEMENT OF THE CASE

This is a twenty-year-old case in which the Ohio courts are attempting to force the re-trial of a District of Columbia case, which was fully tried in 1967 and finalized by appeals during the following two and one-half years. The final result was judgment for the defendants [Petitioners].

In this process, the Ohio courts have evaded and flouted the Full Faith and Credit requirements of the United States Constitution.

Respondent, Russell Morton Brown, filed this suit in Ohio in 1959. Thereafter, he filed the same case in the District of Columbia on May 21, 1963. After trial and verdict for Respondent in the District of Columbia, judgment n.o.v. for Petitioners was entered December 22, 1967. It was affirmed on appeal. During the period of almost seven years in which the District of Columbia case was pending or on appeal, Respondent took no action in the Ohio case.

Respondent's Amended Complaint renewed the Ohio case on July 3, 1974. Petitioners answered asserting constitutional full faith and credit for the District of Columbia judgment.

Subsequently, Petitioners filed a motion for summary judgment based on this full faith and credit defense, which was supported by documentary and other evidence. The Trial Court found "no genuine issue as to any material

fact" relevant to this defense, but it denied the motion for summary judgment and ordered trial on all other issues (A20 and A22).

The Ohio Court of Appeals refused to review these orders and dismissed the appeal, even though they adjudicated substantial constitutional rights of Petitioners. This dismissal was entered January 11, 1979 and reconsideration was denied February 2, 1979 (A3 and A4).

The Supreme Court of Ohio dismissed Petitioners' Appeal on constitutional issues on May 18, 1979, stating that no substantial constitutional question exists. On the same date, it overruled Petitioners' Motion for an order directing the Court of Appeals to certify its records (A1 and A2).

The Trial Court failed properly to give the District of Columbia judgment the same preclusive effect in Ohio as it has in the court where rendered and to distinguish between the constitutional mandate of full faith and credit and common law doctrine of *res judicata*. It excused denial of full faith and credit by concluding, erroneously, that an earlier Ohio Supreme Court decision in this case (1973, 36 Ohio St. 2d 8) held that "the Ohio courts do not have to give the District of Columbia judgment its 'local effect' * * *."[2] (A17).

The critical difference is that full faith and credit is a *constitutional right* which requires that a final judgment *must* be given the same preclusive *effect* nationwide as it has *where rendered*, without regard to the *grounds* on

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2. In this, the Trial Court overlooked the Ohio Supreme Court footnote reference to the Ohio Appellate Rule 12(A) which precludes the Ohio Supreme Court from determining Assignments of Error not passed by the Court of Appeals. See *Lumbermen's Alliance v. American Excelsior Corp.*, 38 Ohio St. 2d 37, 40 (1973).

which it was rendered, whereas *res judicata* is purely a rule of judicial administration.

This important and fundamental distinction has never been drawn, and it should be settled by this Court.

The District of Columbia Case. On May 21, 1963, Russell Morton Brown filed suit in the United States District Court for the District of Columbia alleging that attorney's fees were due him from Edward Lamb and Dispatch, Inc. (corporate predecessor to Lamb Enterprises, Inc.). He vigorously and successfully opposed all efforts of Lamb and Dispatch, Inc. to avoid the jurisdiction of that Court. Motions to quash service and motions for summary judgment were filed by Lamb and denied by the Court. For seven years Brown fully prosecuted his claim in that jurisdiction. After eleven days of trial, October 16 to November 1, 1967, verdicts were returned and judgment entered against defendants for $400,000. On December 22, 1967 this was vacated, and the trial judge entered judgment n.o.v. for Lamb and Dispatch, Inc. on the ground that Brown presented "no evidence * * * requisite for taking" his "action out of the statute of limitations" (A26). This was affirmed by the United States Court of Appeals. *Brown v. Lamb,* 414 F.2d 1210 (D.C. Cir. 1969). And this Court denied certiorari. 397 U.S. 907 (1970).

In a final effort and after denial of certiorari, Brown filed a motion in the Court of Appeals for leave to file a petition for rehearing en banc. This was denied March 30, 1970, and further litigation of his claim in that case was *fully precluded.*

The Ohio Case. During the twenty years since its April 28, 1959 filing, the Ohio case has been on the inactive docket for long periods of time. Originally, a motion directed to the Complaint resulted in a dismissal, appeal

and reversal. Finally, on March 24, 1969, this case was dismissed for want of prosecution.

Brown took no action to challenge this dismissal until after the District of Columbia Court of Appeals turned down his request for rehearing. Then he filed a motion to vacate. The dismissal was vacated, then reinstated. The reinstatement was appealed and affirmed by the Ohio Court of Appeals but reversed by the Ohio Supreme Court in *Brown v. Lamb,* 36 Ohio St. 2d 8 (1973).

In 1974, Respondent filed an Amended Complaint, and for the first time, this case was in a posture where Petitioners were to file an answer. This was filed October 4, 1974, and it stated the defense of full faith and credit for the District of Columbia judgment.

In a collateral lawsuit, the United States District Court for the Northern District of Ohio, Western Division (Toledo, Ohio) enjoined prosecution of the Ohio case, *Lamb Enterprises, Inc. et al. v. Honorable George N. Kiroff, et al.,* 399 F. Supp. 409 (N.D. Ohio 1975) on the ground that the District of Columbia judgment was entitled to full faith and credit. This injunction was vacated by the United States Court of Appeals for the Sixth Circuit, 549 F.2d 1052 (6th Cir. 1977), and certiorari was denied, 431 U.S. 968 (1977). The Court of Appeals did not disagree with Judge Walinski's full faith and credit analysis but held only that it was not "a proper case for federal court injunction." 549 F.2d at 1062.

The current sequence of decisions commenced with Petitioners' September 6, 1977 Motion for Summary Judgment based on their right of full faith and credit to the District of Columbia Judgment. This was supported by affidavit and exhibits fully documenting the District of Columbia litigation, the final judgment, appeal and affirmance. Affidavit Exhibit I is the triple-certified copy of

the Final Judgment relied upon and is authenticated and qualified for full faith and credit recognition under 28 U.S.C. §1738 (A25).

The Trial Court opinion denying this motion for summary judgment was announced August 25, 1978 (A6). Order on this decision (A20) was entered October 6, 1978, wherein the Court found "no genuine issue as to any material fact relevant to defendants'" assertion of Full Faith and Credit, but the motion was denied on the ground of assumed law of the case from the Ohio Supreme Court's prior opinion, 36 Ohio St. 2d 8 (A17).

Subsequently, on October 25, 1978, the Trial Court ordered that there be no further trial on the Full Faith and Credit question and that "this case proceed to trial on all other issues" (A23).

Petitioners' Appeal to the Ohio Court of Appeals was dismissed without reason and reconsideration was denied (A3, A4). No opinion was written nor reason given.

The Ohio Supreme Court dismissed Petitioners' Appeal and denied their Motion to Certify, also without opinion or statement of reason (A1, A2).

Each of these Ohio courts has summarily denied Petitioners' right of full faith and credit to the District of Columbia Judgment.

ARGUMENT

ISSUE NO. 1

The constitutional right of full faith and credit entitles a final judgment of the United States District Court for the District of Columbia, which precludes further litigation on the same claim between the same parties in that jurisdiction, to the same fully preclusive effect in the courts of Ohio and every state of the United States.

Full Faith and Credit. In this case, the Ohio Courts have ignored the federal mandate of Full Faith and Credit. Beyond question, this appeal involves a basic and substantial federal constitutional question. It is of critical importance to the Petitioners and of great importance to the law of relationships between the states of the United States.

On December 22, 1967, the District of Columbia District Court granted final judgment in favor of Petitioners and against Respondent. The Ohio courts have refused Full Faith and Credit recognition to this final, fully-litigated judgment.

Money judgments for *plaintiffs*, divorce judgments and many other judgments have routinely been granted full faith and credit and enforced throughout the United States.

A judgment of *non-liability of defendants* [Petitioners] is entitled in the State of Ohio to that same constitutional force and recognition under the law of the land. U.S. Const., Art. IV, Sec. 1 (Full Faith and Credit), U.S. Const., Art. VI, Cl. 2. (Supreme Law of the Land), and 28 U.S.C. §1738 (the same effect as where rendered).

Simple quotation from Constitution and Statute makes this clear. The U. S. Constitution guarantees that "Full Faith and Credit shall be given in each State to the" judgments "of every other State." And Congress may "prescribe the Manner in which such" judgments "shall be proved, and the Effect thereof." U.S. Const., Art. IV, Sec. 1. And Congress has done so.

When properly certified, a copy of a judgment "so authenticated, shall have *the same full faith and credit* in every court within the United States * * * *as they have by law or usage in the courts of such State, * * * from which they are taken.*" 28 U.S.C. §1738 (emphasis added).[3]

"This * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, * * *." U.S. Const., Art. VI, Cl. 2.

With this specific constitutional support, Full Faith and Credit is *substantively* different from *res judicata,* which is neither constitutional nor statutory but "purely a rule of judicial administration." *Angel v. Bullington,* (1947), 330 U.S. 183, 202 (Reed, *J.,* dissenting).

It is the *effect* where rendered which is determinative, not the judgmental grounds. *Semler v. Psychiatric Institute,* 575 F.2d 922, 927 (D.C. Cir. 1978).

Full Faith and Credit has been held by this Court, to be "a nationally unifying force" which makes each state "an integral part of a single nation, in which *rights judicially established in any part* are given *nationwide application.*" Its clear purpose is to "establish *throughout the federal system* the salutary principle of the common law

3. A District of Columbia judgment, qualified under this statute, is entitled to Full Faith and Credit. *Embry v. Palmer,* 107 U.S. 3, 9-10 (1882); *Symons v. Eichelberger,* 110 Ohio St. 224, 234 (1924).

that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered * * *." *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 439 (emphasis added).

"It substituted a *command* for the earlier principles of comity and thus basically altered the status of the States as independent sovereigns. * * * It ordered submission by one State even to hostile policies reflected in the judgment of another State, because the practical operation of the federal system, *which the Constitution designed,* demanded it." *Estin v. Estin,* 334 U.S. 541, 546 (1948) (emphasis added).

And "the federal purpose of the clause makes this [United States Supreme] court * * * the 'final arbiter'" of its application. *Johnson v. Muelberger,* 340 U.S. 581, 585 (1951); *Morris v. Jones, Dir. of Ins.,* 329 U.S. 545, 551-52 (1947).

Local Effect. As emphasized in *Titus v. Wallick,* 309 U.S. 282, 291 (1939), "It is the *judgment* and *not the cause of action* which gave rise to it for which credit is claimed * * *." (emphasis added).

The effect of this District of Columbia judgment was to foreclose forever, in the District of Columbia, any further legal action or proceedings by Brown against the Petitioners in that jurisdiction.[4] If it were otherwise, Brown would still be litigating there.

This same *effect* must be given that *judgment* in "every other state" and "in every court within the United

4. *Pauling v. McNamara,* 331 F.2d 796 (D.C. Cir. 1963); *Westgate-Sun Harbor Co. v. Watson,* 206 F.2d 458 (D.C. Cir. 1953); *Higginson v. Schoeneman,* 190 F.2d 32 (D.C. Cir. 1951); *Woods v. Cannaday,* 158 F.2d 184 (D.C. Cir. 1946).

States." U.S. Const., Art. IV, Sec. 1; 28 U.S.C. §1738; *see Mills v. Duryee,* 11 U.S. 302, 303-04, 7 Cranch 481, 483-84 (1813); *Hampton v. McConnell,* 16 U.S. 110, 111, 3 Wheaton 232 (1818); *Hancock National Bank v. Farnum,* 176 U.S. 640, 643 (1900); *Titus v. Wallick, supra,* 291-92; *Semler v. Psychiatric Institute,* 575 F.2d 927 (D.C. Cir. 1978).

It is this *local effect* of that judgment which Ohio courts are required, but have refused, to recognize and enforce.

"In other words, the *local effect* must be recognized everywhere through the United States." *Hancock National Bank v. Farnum, supra* at 643.

Speaking more broadly, Chief Justice Marshall said in *Hampton v. McConnell, supra*:

> "* * * This is precisely the same case as that of *Mills v. Duryee;* * * *. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in *the state where it was pronounced,* * * *." 16 U.S. at 111 (emphasis added).

This admonition was repeated for Ohio courts in *Titus v. Wallick, supra,* at 291-92. More recently, it was defined in *Semler v. Psychiatric Institute, supra*:

> "Thus, under the Full Faith and Credit Clause, *the preclusive effect of a judgment must be determined by the law of the state where it was rendered.*" 575 F.2d at 927 (emphasis in original).

Petitioners' judgment (Exhibit I, A24-A27) has since 1970, precluded further legal proceedings on this

cause of action in the District of Columbia. By the United States Constitution, Petitioners are entitled, under the federal system of national government, to have this same local District of Columbia effect given to that judgment in the Ohio courts.

The Trial Court's denial of summary judgment, after finding no genuine issue of fact, and the Ohio Court of Appeals' and Ohio Supreme Court's dismissal orders clearly violate this constitutional right and were erroneous. As final arbiter, this Court should correct that.

ISSUE NO. 2

Where the Ohio trial court finds no genuine issue as to any material fact but still denies full faith and credit to a final, fully-litigated District of Columbia judgment in favor of Petitioners and orders retrial of the same cause of action, substantial federal constitutional rights are abridged and retrial would deny and defeat Petitioners' right of full faith and credit to the District of Columbia judgment.

In the District of Columbia case, preliminary motions and discovery consumed four years. Petitioners' (then defendants) motion to quash service of summons were opposed by Respondent and denied. Petitioners' Motions for Summary Judgment were denied. Petitioners' Motion to Stay Proceeding was not granted.

The jury trial commenced October 16, 1967 and continued to November 1, 1967. Verdict in a total amount of $400,000 in favor of Respondent was returned by the jury. However, this was soon vacated, and judgment n.o.v. was entered for Petitioners. On appeal this was affirmed[5] and Petition for Certiorari was denied by this Court.[6] Respon-

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5. 414 F.2d 1210 (D.C. Cir. 1969).

6. 397 U.S. 907 (1970).

dent's last challenge to the n.o.v. judgment was denied March 30, 1970, when the D. C. Circuit Court of Appeals denied his motion for leave to file a Petition for Rehearing en banc.

Without qualification, respondent fully litigated the District of Columbia case. He pursued it to final preclusive judgment in the court of his selection.

In this type of situation, avoidance of relitigation is the "essence of full faith and credit." *Lamb Enterprises Inc. v. Kiroff*, 549 F.2d 1052, 1057 (6th Cir. 1977); *see Kovacs v. Brewer*, 356 U.S. 604, 611 (1958) (Frankfurter, *J.*, dissenting); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947) (Frankfurter, *J.*, concurring); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943). In a federal system of government, this is necessary, and this Court and its Justices have acknowledged as much.

The "clear purpose of the full faith and credit clause" was "to establish throughout the federal system * * * that a litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered * * *." 320 U.S. at 439.

The "policy" of the full faith and credit clause "was the nationwide restriction of litigiousness, to the extent that States, autonomous for certain purposes, should not be exploited to permit repetitive litigation. In substance, the Framers deemed it against the national welfare for a controversy that was truly litigated in one State to be relitigated in another." *New York ex rel. Halvey v. Halvey, supra* at 616 (Frankfurter, *J.*, concurring).

"It was the purpose of the Full Faith and Credit Clause to preclude dissatisfied litigants from taking advantage of the federal character of the Nation by relitigating in one State issues that had been duly decided in

another. The clause was thus designed to promote a major policy of the law: that there be certainty and finality and an end to harassing litigation." *Kovacs v. Brewer, supra* at 611 (Frankfurter, *J.*, dissenting).

Even in vacating the injunction which had prohibited prosecution of this Ohio court case, the Sixth Circuit Court of Appeals still acknowledged "the essence of full faith and credit that appellees avoid having to 'relitigate' the District of Columbia Action in the courts of Ohio." 549 F.2d at 1057-58.

Consequently, when the Ohio Trial Court denied Petitioners' Motion for Summary Judgment and ordered that this case proceed to trial, it was a violation of Petitioners' right to Full Faith and Credit to the District of Columbia judgment, and it prevented a judgment in favor of Petitioners. Proper recognition would have required summary judgment in their favor.

Here again the Ohio courts have not only brushed aside these federal constitutional tenets but, in doing so, have erroneously applied the Ohio Appeal statute. Ohio Rev. Code Ann., Sec. 2505.02 (PAGES).[7] In *Roemisch v. Mutual of Omaha Ins. Co.* (1974), 39 Ohio St. 2d 119, 122-23,[8] the court stated:

> "'* * * We must assay the total substance of the order. It determines the legal insufficiency of the

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7. "An order affecting a substantial right in an action which *in effect* determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial. * * *." (emphasis added).

8. Quoting with approval from *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732 (1967).

See also *Czech Catholic Union v. East End Building & Loan Assn.*, 140 Ohio St. 465, 469 (1942); *State v. Eberhardt*, 56 Ohio App. 2d 193, 197 (1978).

> complaint as a class suit and preserves for the plaintiff alone his cause of action for damages. In "its legal effect" * * * the order is tantamount to a dismissal of the action as to all members of the class other than plaintiff. * * * it has virtually demolished the action as a class action. If the propriety of such disposition could not now be reviewed, it can never be reviewed.'" 39 Ohio St. 2d at 123.

Paraphrased to the present case this is significant. The Trial Court's orders denying summary judgment and compelling trial on all other issues are tantamount to a denial of Petitioners' constitutional right to full faith and credit. "If the propriety of such disposition could not now be reviewed, it can never be reviewed," because defendants' constitutional right to be free from re-trial of the same case will have been lost before review is permitted.

In effect, respondent has been granted a new trial. The orders appealed from destroy, demolish, disregard and really set aside and vacate the District of Columbia final judgment in favor of the petitioners and grant respondent a new trial which was otherwise completely barred by that judgment. As such, Ohio appellate courts should review it, because that is a final order. Ohio Rev. Code Ann., Sec. 2505.02 (PAGES); *GTE Automatic Electric v. ARC Industries*, 47 Ohio St. 2d 146, 149-50 (1976).

In their determination to compel relitigation and re-trial, the Ohio Appellate and Supreme Court have refused this obvious application of final order definition.

CONCLUSION

The Trial Court realized that by "forcing [Petitioners] to trial without an immediate appeal on the question of full faith and credit, [Petitioners] will, in effect be 'vexed twice'" by respondent's claim and trial (A19). That Court is forcing the trial, and the Appellate and Supreme Courts are denying review on appeal. This adds up to a complete and certain denial by the Ohio courts of Petitioners' constitutional right of Full Faith and Credit to the Final Judgment of the District of Columbia Court.

The Judgments and Decrees below should be reviewed by this Court as final arbiter of the Full Faith and Credit issue, and by Final Judgment here, Petitioners should be relieved of the State Courts' compulsion to relitigate a Judgment already final in the District of Columbia.

Respectfully submitted,

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APPENDIX

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION TO CERTIFY

(Dated May 18, 1979)

No. 79-405

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

RUSSELL MORTON BROWN,
Appellee,

v.

EDWARD O. LAMB, *et al.*,
Appellants.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR LUCAS COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Shumaker, Loop and Kendrick

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated May 18, 1979)

No. 79-405

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

RUSSELL MORTON BROWN,
Appellee,

v.

EDWARD O. LAMB, *et al.*,
Appellants.

APPEAL FROM THE COURT OF APPEALS
FOR LUCAS COUNTY

This cause, here on appeal as of right from the Court of Appeals for Lucas County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lucas County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO DISMISSING APPEAL

(Dated January 11, 1979)

No. L-78-266

IN THE COURT OF APPEALS OF LUCAS COUNTY

RUSSELL MORTON BROWN,
Appellee, Cross-Appellant,

v.

EDWARD O. LAMB, *et al.*,
Appellants.

DECISION AND JOURNAL ENTRY

Appellee's motion to dismiss appeal granted. Appeal is dismissed at appellants' cost.

Cross-appeal of plaintiff-appellee is sua sponte, likewise, dismissed. Cause remanded to the Lucas County Common Pleas Court for execution for costs.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Ten (10) days from the date hereof this document shall constitute the journal entry of judgment and shall be file-stamped by the Clerk of the Court of Appeals, at

which time the period for review will begin to run. App. R. 22(E).

/s/ JOHN W. POTTER
Presiding Judge

/s/ CLIFFORD F. BROWN
Judge

/s/ JOHN J. CONNORS, JR.
Judge

JOHN W. POTTER, *P.J.*, CLIFFORD F. BROWN, JR., *J.*, JOHN J. CONNORS, JR., *J.*, concur.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO DENYING RECONSIDERATION

(Dated February 2, 1979)

No. L 78-266

IN THE COURT OF APPEALS OF LUCAS COUNTY

RUSSELL MORTON BROWN,
Appellee,

v.

EDWARD O. LAMB, *et al.*,
Appellants.

DECISION AND JOURNAL ENTRY

This cause came to be heard upon appellant's application for reconsideration.

Finding no cause to reverse our decision of January 11, 1979, we adhere to our original decision.

Appellant's application for reconsideration is denied.

JOHN W. POTTER, *P.J.*, CLIFFORD F. BROWN, JR., *J.*, JOHN J. CONNORS, JR., *J.*, concur.

DECISION AND JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO DENYING MOTION TO CERTIFY FOR CONFLICT

(Filed February 2, 1979)

No. L 78-266

IN THE COURT OF APPEALS OF LUCAS COUNTY

RUSSELL MORTON BROWN,
Appellee,

v.

EDWARD O. LAMB, *et al.*,
Appellants.

DECISION AND JOURNAL ENTRY

This cause came to be heard upon appellant's motion to certify this case to the Supreme Court of Ohio for reasons of conflict with a decision of another appellate court.

Having considered the briefs submitted by both parties and finding no conflict between our decision and that of any other appellate court of the State of Ohio, we find said motion not well taken.

Appellant's motion to certify is denied.

JOHN W. POTTER, *P.J.*, CLIFFORD F. BROWN, JR., *J.*, JOHN J. CONNORS, JR., *J.*, concur.

OPINION OF THE COURT OF COMMON PLEAS

(Filed August 25, 1978)

Case No. 186753

IN THE COURT OF COMMON PLEAS,
LUCAS COUNTY, OHIO

RUSSELL MORTON BROWN,
Plaintiff,

v.

EDWARD O. LAMB, *et al.*,
Defendants.

OPINION

This matter came on to be heard upon the plaintiff's motion to dismiss or in the alternative to strike the defendants' counterclaim for declaratory judgment. The matter further came on to be heard on the motion of the defendants seeking summary judgment on their counterclaim for declaratory judgment and on the fifth defense contained in their answer on the grounds that the full faith and credit clause of the United States Constitution and its implementing statute is a complete bar to further prosecution of this case. This matter was heard on said motions on the 23rd day of November, 1977, and extensive briefs were filed by counsel thereafter.

I.

It is unnecessary for the Court, in this memorandum opinion, to recap the history of this case. Said

history is adequately set forth in a statement of chronological history which was filed by defendants for the benefit of court and counsel at the time of the hearing. It should, however, be mentioned, as it was in defendants' brief, that plaintiff did not seriously prosecute the case in this Court until after final termination on March 30, 1970 of an identical suit which had been filed in the District of Columbia. Since that time the case has been to the Sixth District Court of Appeals twice,[1] the Supreme Court of Ohio,[2] the United States District Court for the Western Division of the Northern District,[3] the United States Court of Appeals for the Sixth Circuit,[4] and to the United States Supreme Court on a petition for writ of certiorari, which was denied.[5]

After review by the Supreme Court of Ohio, the case was remanded to this Court for further proceedings consistent with its per curiam opinion. *Brown v. Lamb,* 36 Ohio St.2d 8, 302 N.E.2d 582, 65 Ohio Op.2d 64 (1973) (per curiam). However, defendants, by an order of the United States District Court dated November 11, 1974, were granted an injunction in *Lamb Enterprises, Inc. v. Kiroff,* 399 F. Supp. 490 (N.D. Ohio 1975), prohibiting prosecution of the case on the ground that the District of Columbia judgment in Case No. 1292-63 was entitled to full faith and credit. Then, on January 31, 1977, the

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1. *Brown v. Lamb,* C.A. No. 7176 (6th Dist. Ohio App., July 21, 1972); *Brown v. Lamb,* C.A. No. 6918 (6th Dist. Ohio App., Jan. 29, 1971).

2. *Brown v. Lamb,* 36 Ohio St.2d 8, 302 N.E.2d 582, 65 Ohio Op.2d 64 (1973) (per curiam).

3. *Lamb Enterprises, Inc. v. Kiroff,* 399 F. Supp. 409 (N.D. Ohio 1975).

4. *Lamb Enterprises, Inc. v. Kiroff,* 549 F.2d 1053 (6th Cir. 1977).

5. 397 U.S. 907, 90 S. Ct. 904, 25 L.Ed.2d 88 (1970).

United States Court of Appeals for the Sixth Circuit vacated that injunction, 549 F.2d 1053 (6th Cir. 1977). In reversing the District Court for its unwarranted interference in litigation over which state courts have jurisdiction, the Court of Appeals held that the District Court should have exercised equitable restraint and allowed the state courts of Ohio to resolve the issues presented. *Id.* at 1054.

Thus, while the Sixth Circuit Court of Appeals imposed the doctrine of equitable restraint, it did not decide the issue of whether or not the judgment in the District of Columbia constituted a bar to further proceedings in Ohio under the full faith and credit clause. *Id.* at 1062. Rather, the Court noted:

> No basis for equitable relief, justifying an injunction against further proceedings in the State Court, is established on the record in the present case. As set forth in Part IV of this opinion, there is no finding by the District Court of bad faith. Further, appellees are not subjected to harassment or irreparable injury by having to raise their defenses in the Ohio Court. We reemphasize that the Supreme Court of Ohio has remanded the case to the State trial court for further proceedings. No reason is shown why the appellees cannot and will not be accorded a fair trial on the merits of their case in the Court of Common Pleas of Lucas County, Ohio, where the full faith and credit, res judicata and collateral estoppel defenses presumably remain available to them.

Id. at 1061. The Court further explained:

> In the present case there is an unresolved question as to whether there has been a full and final adjudication of all the questions of law and fact in the District of Columbia litigation. The decision of

> the Court of Appeals for the District of Columbia was that Brown's suit in that jurisdiction was barred by the three year District of Columbia statute of limitations. *Brown v. Lamb, supra,* 414 F.2d 1210 (D.C. Cir. 1969). *The question of whether the District of Columbia decision forecloses the right of Brown to proceed with his litigation in the Ohio courts is an issue to be decided by the state courts.*

Id. 1061-62 (emphasis added).

II.

The defendants in these motions now up for decision persist in their claim that this action is barred by the doctrine of full faith and credit. Moreover, their "pique" at having to relitigate this matter is evident throughout their oral arguments and briefs. They argue with great force that plaintiff commenced this lawsuit in Lucas County, Ohio, then filed a second lawsuit in Washington, D. C. and vigorously prosecuted that action. Meanwhile, the defendants endeavored in every manner possible to obviate the D. C. litigation. Defendants point out that they sought to quash service of summons in the District of Columbia; that defendants raised the issue of the statute of limitations in the District of Columbia and sought a summary judgment thereon; and that the defendants tried to get a stay in the District of Columbia proceedings pending prosecution of this case in the Ohio court.

In addition, defendants maintain that once forced to trial in the District of Columbia where final judgment was rendered in its favor by the Circuit Court of Appeals on the issue of the statute of limitations, they must now be protected from being "vexed twice" in Ohio by the same plaintiff who had pursued the identical action in the

District of Columbia.[6] Defendants urge that plaintiffs should not now be given a second "bite of the apple" since this is the very essence of what the full faith and credit, res judicata and estoppel doctrines were formulated to prevent.

On the other hand, plaintiff argues with equal force that these doctrines do not apply to a judgment based on the statute of limitations since such a judgment is not "on the merits" as to the Ohio action. Plaintiff further argues that the law in the case sub judice has been established by the Ohio Supreme Court and this contention will be addressed later in this opinion.

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6. In the case sub judice the defendants analogize that the selection of the District of Columbia forum, like selection of remedies, bars them from being vexed twice for one and the same cause on the theory of estoppel. *See, e.g., United States v. Oregon Lumber Company,* 260 U.S. 290, 43 S. Ct. 100, 67 L.Ed. 261 (1922). There, plaintiffs brought an original suit in equity and when an answer was filed raising the statute of limitations, the Court held that it should have conveyed to plaintiff a warning of the danger of continuing the equity lawsuit further. However, plaintiff persisted in pursuing the equity suit to its final adverse judgment. Plaintiff then attempted to refile under a different theory of recovery for which the statute had not run. The court held as follows:

> The distinguishing feature of the instant case is that *after the coming in of the answer, pleading the statute of limitations,* and the plain warning thus conveyed of the danger of continuing the equity suit further, the *plaintiff* in error *persisted in pursuing it to final judgment,* instead of promptly reforming the cause or dismissing the bill and seeking the alternative remedy not subject to the same defense. The doctrine of election of remedies and that of res judicata are not the same, but they have this in common, that each has for its underlying basis *the maxim which forbids that one shall be twice vexed for one and the same cause.* The policy embodied in this maxim we think requires us to hold that the plaintiff in error, in bringing the original suit, and in continuing after the plea in bar to follow it to a final determination, made an irrevocable election, and that it is now estopped from maintaining the present inconsistent action.

Id. at 301 (emphasis added).

Because of counsel's persistence in arguing the full faith and credit question; and because the United States Court of Appeals stressed that the Ohio courts could adequately dispose of the federal full faith and credit question[7]; and in light of the Ohio Supreme Court comments in *Brown v. Lamb* with respect to the case of *LaBarbera v. Batsch,* 10 Ohio St.2d 106, 227 N.E.2d 55, 39 Ohio Op.2d 103 (1967), a discussion of the doctrines is necessary.

It is not surprising to this Court that no less than five theories have been advanced as the proper basis for resolution of the legal issues involved. Thus, it has been suggested that the District of Columbia judgment requires application of both res judicata and estoppel by judgment principles, *see* Judgment Entry of Judge Baynes, March 6, 1972; that the plaintiff abandoned its case, *see Brown v. Lamb,* C.A. No. 7176, slip op. at 2 (6th Dist. App., July 21, 1972); that the plaintiff's cause of action merged in the judgment rendered by the District of Columbia Court, *see* Brief of Defendants in Opposition to Plaintiff's Motion to Dismiss or Strike Defendant's Counterclaim and in Support of Defendant's Motion for Summary Judgment at 18; that the District of Columbia judgment is entitled to full faith and credit under Article IV, Section 1 of the United States Constitution and, therefore, precludes litigation in this matter, *id.* at 5; and that the plaintiff is entitled to present the merits of its case because the effect to be given the District of Columbia judgment is "a matter of local law." *See* Plaintiff's Motion to Dismiss Counterclaim or in the alternative Motion to Strike Counterclaim at 5. At this point, however, the precise issue before

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7. Full faith and credit involves a federal right and is controlled by federal law. *Magnolia Petroleum Company v. Hunt,* 320 U.S. 430, 64 S. Ct. 208, 88 L.Ed. 149 (1943), *rehearing denied,* 321 U.S. 801, 64 S. Ct. 483, 88 L.Ed. 1088 (1944).

the Court may be stated as follows: What is the effect which this Court must give to the judgment rendered by the United States District Court for the District of Columbia?

According to plaintiff, it is entitled to present its case to this Court on the merits because the question of the effect to be given the statute of limitations is a question of local law; as a result, plaintiff contends, this Court must look to the *Ohio statute of limitations* to determine what effect it must be given to a judgment based on the District of Columbia statute of limitations.[8]

Further, plaintiff asserts that the running of the statute of limitations in Washington, D. C., merely extinguishes the remedy and not the right behind the cause of action. But the cases cited by the plaintiff in support of this contention are readily distinguishable from the case at bar. A careful reading of these cases demonstrates the significance therein of the revival of a debt by new and adequate consideration so as to take the case out of the statute of limitations, *see, e.g., Bell v. Morrison,* 26 U.S. (1 Pet.) 351 (1828); *Cafritz v. Koslow,* 167 F.2d 749 (D.C. Cir. 1948); or the restricted use of the statute of limitations as a shield but not a sword. *See Talbott v. Hill,* 261 F. 244 (D.C. Cir. 1920).

Plaintiff's strongest argument is its claim that the "running of the statute of limitations in the District of Columbia does not bar an action on the same claim in another jurisdiction where the statute of limitations has

8. This contention would be true if plaintiff were seeking to enforce a valid foreign judgment in an Ohio court. On the facts of the instant case, if plaintiff had succeeded in its District of Columbia action and if judgment had been rendered in its favor, then an action on that prior judgment by plaintiff in the Ohio Courts would be governed by the Ohio statute of limitations. *See e.g., M'Elmoyle v. Cohen,* 38 U.S. (13 Pet.) 312, 10 L.Ed. 177 (1839).

not run." For its authority, plaintiff relies on a Second Circuit decision, *Warner v. Buffalo Drydock Co.,* 67 F.2d 540 (2d Circuit 1933), *cert. denied, Buffalo Drydock v. Salkfeld,* 291 U.S. 678 (1934), as well as decisions of the Third and Fifth Circuits which follow *Buffalo Drydock. See Fricks v. Carroll,* 368 F.2d 328 (5th Cir. 1966); *Hartmann v. Time, Inc.,* 166 F.2d 127 (3d Cir. 1948). Similarly, plaintiff relies on the Restatement of Judgments Section 49, comment a at 194-95 (1942). While this position may represent the majority view in the United States, *see also, Western Coal and Mining Co. v. Jones,* 27 Cal.2d 819, 167 P.2d 719 (1946) (en banc); *Brand v. Brand,* 116 Ky. 785, 76 S.W. 868 (App. 1903), it must be noted that the trend or modern view is diametrically opposed.

For example, since its decision in *Buffalo Drydock,* the Second Circuit courts have rendered a series of decisions which implicitly if not explicitly have overruled *Buffalo Drydock. See Sack v. Low,* 478 F.2d 360 (2d Cir. 1973); *Bertha Bldg. Corp. v. Nat. Theatres Corp.,* 248 F.2d 833 (2d Cir. 1957), *cert. denied,* 356 U.S. 936 (1957); *Murphy v. A/S Sobral,* 187 F. Supp. 163 (S.D.N.Y 1960); *McNaughten v. Hudson,* 377 N.Y.S.2d 140, 50 App. Div.2d 863 (1975). These cases acknowledge the impact on the federal courts of Rule 41(b) of the Federal Rules of Civil Procedure, which in essence states that a dismissal based on the statute of limitations "operates as an adjudication on the merits" where the district judge does not specify otherwise. *Accord,* Ohio R. Civ. P. 41(b)(3). Moreover, the tentative draft of the Restatement (Second) of Judgments also adopts this position. *See* Restatement (Second) of Judgments Section 48.1(1)(c) comment j at 42 (Tent. Draft, No. 1, 1973).

It is the modern view which represents the basis of defendant's argument, namely, that the District of Co-

lumbia judgment n.o.v. was an adjudication on the merits and as such is entitled to full faith and credit under Article IV, Section 1 of the United States Constitution and 28 U.S.C. Section 1738. Otherwise stated, the defense relies on the language of the United States Supreme Court in *Magnolia Petroleum Co. v. Hunt, supra*:

> (a) litigation once pursued to judgment shall be as conclusive of the rights of the parties in every other court as in that where the judgment was rendered, so that a cause of action merged in one state is likewise merged in every other.

320 U.S. at 439. From this premise, the defendant argues that the District of Columbia judgment is res judicata and, therefore, further litigation by plaintiff is barred.[9]

On the simplest level, this determination could be made by answering the question whether the District of Columbia judgment, based on the statute of limitations, is a judgment on the merits. This Court has already discussed the two conflicting views on the issue—the majority rule and the modern trend. In light of the 1947 decision in *Angel v. Bullington,* 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947), wherein the Supreme Court held that "the merits of a claim are disposed of when it is refused enforcement," *id.* at 190, this Court would,

9. The doctrine of res judicata is often loosely intertwined with the constitutional mandate of full faith and credit. See *e.g., Durfee v. Duke,* 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed.2d 186 (1963), wherein the Court explained:

> "(F)ull faith and credit thus generally requires every state to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the state which rendered it. 'By the constitutional provision for full faith and credit, the local doctrines of *res judicata,* speaking generally, become a part of national jurisprudence. . . .'"

Id. at 109 (citation omitted).

under ordinary circumstances, be inclined to follow the emerging view.[10]

But the instant case does not present a case where; for example, plaintiff filed first in the District of Columbia whereupon judgment n.o.v. was entered for defendant and *subsequently* plaintiff filed in this Court. Rather, the unique facts of this case require this Court to look beyond the basic principles cited by the respective parties to the decision rendered by the Ohio Supreme Court in *Brown v. Lamb, supra.*

IV.

What is the law of the case sub judice? In *Brown v. Lamb* the Supreme Court held that the trial court committed prejudicial error in staying its order of October 5 reinstating this case on the docket. The Court further held that any errors which occurred in subsequent proceedings could not have transpired but for that original error.

This holding seems simple enough. But the comments made by the Supreme Court in its per curiam opinion have caused counsel and the court problems. Most notably, the Court in *Brown v. Lamb* stated:

> (w)e also note that the case of *LaBarbera v. Batsch* (1967) 10 Ohio St.2d 106, 39 O.O.2d 103, 227 N.E.2d 55 is distinguishable upon its facts from the instant case, is not dispositive of the issue involving res judicata and should not have been relied upon for that purpose below.

10. If full faith and credit represents the "national jurisprudence" on the doctrines of res judicata and estoppel, and if a judgment on the statute of limitations is a judgment on the merits, it should bar the further prosecution of this suit in this Court.

36 Ohio St.2d at 11. In *LaBarbera* the Supreme Court set forth the various rules of law at issue here, as well as the underlying policy considerations. First, with respect to res judicata, the court explained:

> The policy of *res judicata* is to assure an end to litigation, and to prevent a party from being vexed twice for the same cause. . . . Statutes of limitations are similarly designed to assure an end to litigation and to establish a state of stability and repose.

39 Ohio Op. at 108 (citations omitted). Second, in its analysis of the applicable statute of limitations, the Court noted that

> the General Assembly must be presumed to have known that a judgment based upon the statute of limitations is generally regarded as *on the merits* and bars another action for the same cause within the state rendering it.

Id. at 109. Third and equally significant is the comment by the Court relating to estoppel:

> Even if this dismissal were not on the merits (contrary to our later holding herein) where this same issue is raised in a subsequent suit on the same cause of action between the same parties, the elements of a 'direct estoppel' are present.

Id. at 105 (citations omitted).

It is obvious that the facts in *LaBarbera* are different from the case at bar. There, a suit was dismissed without a trial on the issues because the action had not been commenced within the periods prescribed by statute. Thereafter, the dismissal was affirmed on appeal and further appeal time expired. Subsequently, the action was

refiled under the guise of the savings statute, Section 2305.19, Ohio Revised Code.

What then are the distinguishing facts in this case that caused the Ohio Supreme Court to state that *LaBarbera* was not dispositive of the issues of res judicata and estoppel? This Court is left to speculate; it is most probably because of the singular fact that the case herein was originally commenced in Ohio where no statute of limitations problem existed. It was neither prematurely filed as in *Belpash v. Emerine*, 119 Ohio St. 226, 162 N.E. 799 (1928), nor did it involve a refiling or a revival of an action, *see* slip op.1 at 5. Rather, this case was still pending in Ohio when the action was filed, tried and reduced to judgment in the District of Columbia. It must, therefore, be assumed that the Supreme Court in *Brown v. Lamb* found that the operative facts in the instant case precluded the application of the doctrines of full faith and credit, res judicata and estoppel. In other words, the Ohio courts do not have to give the District of Columbia judgment its "local effect" and, therefore, such judgment is neither on the merits nor does it create an estoppel to this action.[11] Since the defendants raised these issues in *Brown v. Lamb* and did not seek an appeal to the United States Supreme Court from that ruling, the decision in *Brown v. Lamb* must stand as the law in this case.

It is, therefore, the opinion of this Court that the law in the instant case has been established by the Ohio

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11. Plaintiff maintains that the comment by the Ohio Supreme Court in *Brown v. Lamb* that the dismissal of the instant case constituted an erroneous denial of a day in court for (Brown) was a mandate to this Court that a trial should be had on the merits and that the motions for summary judgment on the counterclaim for declaratory judgment and on the fifth defense of full faith and credit in the answer do not constitute "a day in court." In view of this court's holding on the full faith and credit issue, it is unnecessary to address this contention.

Supreme Court in *Brown v. Lamb*. Accordingly, the motion for summary judgment on the counterclaim for declaratory judgment and on the fifth defense contained in the defendant's answer is not well taken and the same is ordered overruled; consequently, plaintiff's motion to dismiss counterclaim or in the alternative motion to strike counterclaim is also not well taken and is hereby overruled.

/s/ GEORGE N. KIROFF
Common Pleas Judge

DECISION ON MOTION OF THE COURT OF COMMON PLEAS

(Filed September 19, 1978)

No. 186753

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

RUSSELL MORTON BROWN,
Plaintiff,

v.

EDWARD O. LAMB, *et al.*,
Defendants.

DECISION ON MOTION

This cause came on to be heard upon the Motion of Defendants for Entry of Final Judgment and Determination of No Just Reason for Delay, and upon the Motion in Opposition to Defendants' Motion for Entry of Final Judgment filed by plaintiff.

Through its motion, defendants urge this Court to certify its decision of August 25, 1978, denying defendants' Motion for Summary Judgment, and thereby allow defendants to appeal that ruling as a final appealable order pursuant to Ohio Civ. R. 54(B).

In opposition, plaintiff maintains that Rule 54(B) is inapplicable to the case at bar, because the Court's denial of defendants' Motion for Summary Judgment did not dispose of a "claim" presented by defendants; rather, plaintiff argues, the Court's decision rejected defendants' defenses which, if successful, would have barred further proceedings herein. According to plaintiff's interpretation of Rule 54(B), this absence of a "claim" precludes reliance on Rule 54(B) at this time.

In considering the propriety of defendants' present motion, this Court has read all cases cited by the parties in their respective memoranda. Upon review thereof, this Court must agree with plaintiff that defendants have mischaracterized its defenses as a "counterclaim" in an effort to avoid or to delay another trial in this matter. As indicated in its decision of August 25, 1978, this Court remains convinced that the law in this case has been determined by the Ohio Supreme Court in *Brown v. Lamb*, 36 Ohio St.2d 8, 302 N.E.2d 582, 65 Ohio Op.2d 64 (1973) (per curiam); as a result, Rule 54(B) is not the proper remedy and may not be utilized to circumvent the effect of that case.

While this Court realizes that, in forcing defendants to trial without an immediate appeal on the question of full faith and credit, defendants will in effect be "vexed twice," defendants have failed to present a viable alternative to this Court which would permit a different result. Because defendants chose not to challenge the Supreme Court's decision in *Brown v. Lamb, supra*, during the allow-

able time for appeal, this Court now has no choice but to proceed with trial.

In light of the foregoing, the Court finds that the Motion of Defendants for Entry of Final Judgment and Determination of No Just Reason for Delay is not well taken and is hereby denied.

/s/ GEORGE N. KIROFF
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS DENYING MOTION FOR SUMMARY JUDGMENT

(Filed October 6, 1978)

Case No. 186753

COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

RUSSELL MORTON BROWN,
Plaintiff,

v.

EDWARD O. LAMB, *et al.*,
Defendants.

JOURNAL ENTRY

This cause came on to be heard on the Motion of defendants for Summary Judgment and on the Motion of plaintiff to Dismiss or to Strike the Counterclaim. The Motion for Summary Judgment was submitted to the Court on the pleadings, Answers to Interrogatories and Affidavit on file in this case, together with briefs and arguments of

counsel and the Motion to Dismiss or to Strike the Counterclaim was submitted to the Court on the briefs and arguments of counsel.

The Court, being fully advised in the premises, finds that as to the Motion for Summary Judgment, there is no genuine issue as to any material fact relevant to defendants' Counterclaim or defendants' Fifth Defense but that defendants are not entitled to judgment as a matter of law and, consequently that the Motion for Summary Judgment is not well taken and should be overruled.

The Court further finds that the Motion to Dismiss or Strike the Counterclaim is also not well taken and should be overruled.

The reasons for these rulings are stated in the Court's Opinion filed herein on August 25, 1978.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendants' Motion for Summary Judgment be, and the same hereby is, denied and overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff's Motion to Dismiss or to Strike the Counterclaim be, and it hereby is, overruled and denied.

/s/ GEORGE N. KIROFF
Common Pleas Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS DENYING SEPARATE TRIAL ON FULL FAITH AND CREDIT DEFENSE

(Filed October 25, 1978)

Case No. 186753

COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

RUSSELL MORTON BROWN,
Plaintiff,

v.

EDWARD O. LAMB, *et al.*,
Defendants.

JOURNAL ENTRY

This cause came on to be heard on the Motion of defendants for Separate Trial of defendants' Counterclaim and Defense of Full Faith and Credit to the Final Judgment entered December 22, 1967 in the case of *Russell M. Brown v. Edward O. Lamb and Dispatch, Inc.*, Case No. 1292-63 in the United States District Court for the District of Columbia and the same was submitted to the Court on the record, briefs and statements of counsel.

The Court finds that in its ruling on defendants' Motion for Summary Judgment, it determined that there is no genuine issue as to any material fact relevant to defendants' Counterclaim or defendants' Affirmative Defense of Full Faith and Credit but that defendants are not entitled to judgment on those issues as a matter of law and consequently finds that this Motion for Separate Trial is not well taken and should be overruled.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that defendants' Motion for Separate Trial of defendants' Counterclaim and Affirmative Defense of Full Faith and Credit to the District of Columbia Judgment be, and the same hereby is, overruled and it is ordered that this case proceed to trial on all other issues.

Upon plaintiff's request at pretrial conference, IT IS FURTHER ORDERED that he be granted leave to file a Motion for Summary Judgment herein.

/s/ GEORGE N. KIROFF
Common Pleas Judge

CERTIFICATION OF FINAL JUDGMENT OF U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States District Court

for the

DISTRICT OF COLUMBIA

I, Herbert N.Haller, Chief Deputy Clerk of the United States District Court for the District of Columbia, and keeper of the records and seal thereof, hereby certify that the documents attached hereto are true copies of Order filed December 22, 1967, Granting Defendants motion for judgment non obstante veredicto, or in the alternative, for a new trial now remaining among the records of the Court.

In testimony whereof I hereunto sign my name and affix the seal of said Court, in said District, at Washington D.C., this 29th day of July 1977.

Herbert N.Haller, Chief Deputy Clerk.

I, William B. Bryant, Chief United States District Judge for the District of Columbia, do hereby certify that Herbert N. Haller, Chief Deputy Clerk of said Court, whose name is above written and subscribed, is and was at the date thereof duly appointed and sworn, and keeper of the records and seal thereof, and that the above certificate by him made, and his attestation or record thereof, is in due form of law.

July 29, 1977

United States District Judge.
William B. Bryant, Chief Judge

I, Herbert N. Haller, Chief Deputy Clerk of the United States District Court for the District of Columbia, and keeper of the seal thereof, hereby certify that the Honorable William B. Bryant whose name is within written and subscribed, was on the 29th day of July 1977, and now is Chief Judge of said court, duly appointed, confirmed, sworn, and qualified; and that I am well acquainted with his handwriting and official signature and know and hereby certify the same within written to be his.

In testimony whereof I hereunto sign my name, and affix the seal of said Court at the city of Washington D.C., in said State, on this 29th day of July 1977.

Herbert N.Haller, Chief Deputy Clerk.

Ex. I

*By stipulation it has been ordered that this Certificate should properly and correctly state that the attached Order was "Filed December 22, 1967" and that this correction may be indicated on the original copy of Exhibit I.

FINAL JUDGMENT OF THE U. S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Filed December 22, 1967)

Civil Action No. 1292-63

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RUSSELL MORTON BROWN,
Plaintiff,

v.

EDWARD OLIVER LAMB
and
DISPATCH, INC.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT NON OBSTANTE VERECICTO, OR IN THE ALTERNATIVE, FOR A NEW TRIAL

This matter coming on for consideration by the Court upon motion by defendants for judgment n.o.v. or in the alternative for a new trial, and upon consideration of the respective points and authorities filed by the defendants and plaintiff, and it appearing to the Court that the statute of limitations had run prior to the filing of this action,[1] that

---

1. D.C. Code, § 12-301 (1967) formerly D.C. Code § 12-201 (1961), limits the bringing of an action on a simple contract, express or implied, to a period of 3 years from the time the right to maintain the action shall have accrued. The plaintiff rendered no services after mid-June 1957 but did not file this action until May 21, 1963.

no evidence was adduced at the trial of a character requisite for taking this action out of the statute of limitations,[2] and hence that the motion for judgment n.o.v. should be granted;

AND with respect to so much of defendants' motion as in the alternative seeks a new trial, the Court being of the opinion that in the event the judgment n.o.v. which is to be entered herein for defendants should be thereafter vacated or reversed[3] a new trial should be granted on the ground that the verdicts are excessive and that the manner in which plaintiff presented his case was such as to prejudice the jury against the defendant[4];

---

2. D.C. Code § 12-305 (1961), now D.C. Code § 28-3504 (1967), provides in pertinent part: "In actions of debt or upon the case grounded upon any simple contract, no acknowledgement or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the statute of limitations or to deprive any party of the benefit thereof unless such acknowledgement or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." See also Hornblower v. George Washington University, 31 App. D.C. 64 (1908); Moore v. Snider, 71 App. D.C. ——, 109 F.2d 840 (1940), cert. den., 309 U.S. 685; Howard University v. Cassell, 75 App. D.C. 75, 126 F.2d 6 (1941), cert. den., 316 U.S. 675, rehearing denied, 316 U.S. 711.

3. Rule 50(c)(1), Federal Rules of Civil Procedure, provides in part: "If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial."

4. The claim of plaintiff in this action is grounded primarily on services rendered by him in a proceeding before the Federal Communications Commission which questioned the propriety of the renewal of a television license held by a corporation on the ground that the Commission had information that Mr. Lamb, a controlling officer of the corporation, was a Communist, had Communist affiliations, and had promoted Communism, etc. At the trial of this action plaintiff maintained that in order to show the services he had rendered he must necessarily indicate the charges he had to overcome. However, more emphasis was placed on the charges than on the services, supplemented by

(Continued on Following Page)

Now, therefore, it is this 22nd day of December 1967:

ORDERED That judgment non obstante veredicto be and the same is hereby entered for the defendants, and it is further

ORDERED That if hereafter said judgment be vacated or reversed, then and in that event, a new trial is granted.

/s/ BURNITA SHELTON MATTHEWS
Judge

Footnote continued—

prejudicial intimations that the charges were true after all. For instance, plaintiff's attorney in final argument said:

> "Ladies and Gentlemen of the Jury, one of the exhibits that was introduced by the Government (referring to the FCC case) was a book written by Mr. Edward Lamb—the defendant in this case—entitled 'The Planned Economy of Soviet Russia', and what is charged by the government against Edward Lamb is the fact that he urged the overthrow of the United States Government by force and violence. And here is what they refer to:
>
> 'If the American planned economy is to be achieved it becomes evident that those who produce, the workers and farmers, and those who defend - this is the militia men - through joint action and organization surely must assume title to the means of production.'
>
> *Now, if there ever was a statement that urges the overthrow of this government* by the farmers and the militia men *this is that statement* and this is just one of the many statements that they had of Edward Lamb being made and going into the communist movement, in other words copies of the Daily Worker, to which Mr. Lamb contributed, and as counsel to the organizations such as the legal tool of the communist party; this is a man who was accused of being a communist fellow traveller and this is the type of evidence that was presented against him. This is the type of evidence that Russell Morton Brown had to overcome." (Emphasis supplied.)

DOCKET ENTRIES OF U. S. DISTRICT COURT FOR DISTRICT OF COLUMBIA (Civil Action No. 1292-63)

COPY

CIVIL DOCKET

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Parties	Attorneys	Number
Russell Morton Brown	Milton M. Burka 1010 Vermont Ave., N.W.	1292-63
v.	Maurice C. Goodpasture 828 Federal Bar Bldg.	Action for
1. Edvard Oliver Lamb	George E. C. Hayes 613 F. St. N.W.	Recover Attorney Fees $500,000.00
2. Dispatch, Inc., A Corporation	~~Lowell Goerlich~~ ~~1126 16th Stry N.W.~~ 3841 Harrison St., N.W.	
	do	
	M. Mayer Baker John P. Carrigan 400 Madison Ave. Toledo, Ohio	
	Jury Demand X	

Date	Account	Rec'd.	Disb'd.
1963			
May 21	Goodpasture	10.00	
May 21	U. S. Treas.		10.00
1968			
Jan. 18	Burke	5.00	
Jan. 18	U. S. Treas.		5.00
Feb. 23	Burke	2.60	
Feb. 23	U.S. Treasury		2.60
May 15	Burke	.50	
May 15	U.S. Treasury		.50

Date	Proceedings	
1963		
May 21	Complaint, appearance, jury demand	Filed
May 21	Summons, copies (2) and copies (2) of Complaint issued Both ser 5/21/63	
June 10	Motion of deft #1 to quash service; P & A; c/m 6/10/63 MC 6/10/63; appearance of Lowell Goerlich	Filed
June 10	Motion of deft #1 to strike; P & A: c/m 6/10/63; MC 6/10/63	Filed
June 10	Motion of deft #2 to quash; P & A; c/m 6.10/63; MC 6/10/63; appearance of Lowell Goerlich	Filed
June 21	Points and authorities of pltf in opposition to motion to strike; c/m 6/21/63	Filed
June 21	Points and authorities of pltf in opposition to motion of deft #1 to quash; c/m 6/21/63	Filed

EXHIBIT C

Brown v. Lamb C.A. No. 1292-63

Date	Proceedings	
June 21	Points and authorities of pltf in opposition to motion of deft #2 to quash; c/m 6/21/63	Filed
July 13	Affidavit of Edvard Lamb	Filed
Sept. 13	Affidavit of pltf.	Filed
Oct. 3	Affidavit of Edvard Lamb	Filed
Oct. 8	Supplemental memorandum of defendants; c/s 10/8/63	Filed
Oct. 7	Additional authorities of pltf. in opposition to motion of Dispatch; c/m 10/7/63	Filed
Nov. 5	Motion of deft. #2 for summary judgment; P & A; c/m 11/5/63; MC 11/5/63	Filed
Nov. 5	Motion of deft. #1 for summary judgment; P & A; c/m 11/5/63; MC 11/5/63	Filed
Nov. 12	Order denying motion to strike certain allegations from complaint. (N)	McGarraghy, J.
Nov. 12	Order denying motion of deft Dispatch, Inc., to quash service of process. (N)	McGarraghy, J.
Nov. 12	Order denying motion of deft Edvard Oliver Lamb to quash return of service of summons. (N)	McGarraghy, J.
Nov. 19	Stipulation extending time for pltf to oppose motion for summary judgment to and including 11/27/63. (M/N)	Filed
Nov. 26	Points and Authorities of plaintiff in opposition to motions for summary judgment, Statement of genuine issues; Affidavit c/m 11/26/63	Filed
Dec. 17	~~Motion of defts #1 to quash service & dismiss corpl; service of answer of defts #2 & dismiss crossclaim; Affidavit; Notice; P & A's; c/m 12/16/63; App. Warren Ev Hagee; error~~	Filed
Dec. 17	Affidavit of Edvard Lamb; c/ser 12/17/63	Filed
1964		
Jan. 9	Order denying motions of defts for summary judgment. (N)	McGarraghy, J.
Jan. 23	Answer of deft #1 to complaint; c/m 1/23/74	Filed
Jan. 23	Answer of deft #2 to complaint; c/m 1/23/64	Filed
Jan. 23	Calendared (AC/X) (N)	
Feb. 11	Interrogatories by defendant #1 to plaintiff. c/m 2/1/64	Filed
Feb. 17	Stipulation of counsel extending time for pltf to answer or object to interrogatories to and including 3/17/64	Filed
Mar. 26	Answer of pltf to interrogatories; c/m 3/26/64	Filed
Oct. 15	Called	Pretrial Examiner
1965		
Jan. 21	Certificate of Readiness of pltf. c/m 1/21/65	Filed
Jan. 29	Opposition of deft to certificate of readiness; c/m 1/28/65; MC 1/29	Filed
Mar. 5	Recommendation overruling opposition of deft to certificate of readiness provided that deft may take deposition of pltf on or before April 15, 1965, & if deft takes deposition of pltf, pltf may depose deft on or before May 1, 1965. Micro 3/8/65	Asst. Pretrial Examiner

Brown v. Lach CA No. 1292-63

Date	Proceedings	
1965		
Mar. 11	Notice of defendants to take oral deposition of plaintiff; c/m 3/10/65	Filed
Mar. 15	Notice of pltf to take oral deposition of deft #1; c/m 3/8	Filed
1966		
Nov. 16	Change of address of atty for defts. (AC/M)	Filed
Nov. 16	Pretrial proceedings (11/15/66) (Pltf may take deposition of deft #1 and deft #1 may take deposition of pltf)	Pretrial Examiner
Nov. 23	Notice of pltf to take deposition of deft #1; c/m 11/23/66	Filed
Dec. 1	List of witnesses by pltf; c/m 12/1/66	Filed
Dec. 2	Appearance of M. Hayer Baker and John F. Garrigan as counsel for defts. entered. (Rep. Martha Malone. (Fiat)	Curran, C.J.
Dec. 2	Withdrawal of appearance of Lowell Goerlich as counsel for defts, without waiver of attorney fees (Rep. Martha Maloney) fiat.	Curran, C.J.
Dec. 2	Order striking certificate of readiness. M. AC/M (Fiat) (Rep. Martha Maloney) (Fiat)	Curran, C.J.
1967		
Jan. 11	Notice of defts to take deposition of The Chesapeake and Potomac Telephone Co; The Riggs National Bank of Washington, D. C. and Russell Morton Brown; c/m 1/10/67	Filed
Jan. 31	Deposition of deft. #1, 12/16/66	Filed
Feb. 21	Motion of defts for summary judgment; notice; P&A; Exhibit A, B & C; statement; c/m 2/20/67; M.C.	Filed
Feb. 24	Deposition of pltf; Jan 23 and 24, 1967 (Costs $171.25)	Filed
Mar. 1	Stipulation of counsel for extension of time for pltf to file opposition to motion for summary judgment to and including 3/10/67	Filed
Mar. 9	Opposition of pltf to motion of defts for summary judgment; P&A; statement; affidavit; c/m 3/8/67	Filed
Mar. 17	Deposition of Riggs National Bank by Rachel Simpson on 1/23/67;	Filed
Mar. 21	Transcript of proceedings 12/17/63, Pages 1-14 (Motion) Rep: Ida Z. Watson) Court's copy	Filed
May 2	Motion of defts to stay proceedings; notice; P&A; c/m 5/2/67 MC	Filed
May 4	Order denying defendants' motion for summary judgment. (M)	McGarraghy, J.
May 11	P&A of pltf in opposition to motion to stay; c/m 5/12/67	Filed
June 1	Supplemental memorandum of pltf in opposition to motion of deft to stay proceedings; c/s 6/1/67	Filed
June 1	Certificate of Readiness per all counsel. AC/M	Filed
June 13	List of witnesses by pltf; c/s 6/13/67	Filed

Brown v. Lach C.A. No. 1292-63

Date	Proceedings	
1967		
June 13	Services performed by pltf for defts; c/s 6/13/67; as per counsel for pltf.	Filed
June 15	Notice of pltf to produce; c/m 6/14/67	Filed
June 15	List of witnesses by pltf; c/m 6/14/67	Filed
July 13	Motion of pltf to enjoin disposal of asses; P&A; exhibits A & B; affidavit; c/m 7/7/67; M.C. (fiat)	Waddy, J.
July 18	Opposition of defendants to motion of plaintiff to enjoin disposal of assets. c/m 7/17/67	Filed
Aug. 1	Notice of defts. to take deposition of pltf; c/m 7/24/67 (fiat)	Waddy, J.
Aug. 4	Order denying plaintiff's motion to enjoin disposal of assets pendente lite. (M)	Waddy, J.
Aug. 23	Motion of defts for production, inspection and copying of documents; notice; P&A; exhibits A, B; c/m 8/14/67; M.C. (fiat)	Curran, C.J.
Aug. 23	Points and authorities in opposition to motion of defts for production; inspection and copying of documents; c/m 8/1/67	Filed
Sept. 13	Withdrawal of Motion for Production of Documents, per counsel for defendants. c/m 9/11/67	Filed
Sept. 22	List of witnesses by defts; c/m 9/21/67	Filed
Sept. 27	Depositions of William Hildebrand, Jr.; 8/31/67 published	Filed
Oct. 2	Additional list of witnesses by pltf; c/m 9/29/67	Filed
Oct. 9	Leave to file motion of pltf for leave to join Lach Enterprises, Inc., as a party deft - Denied without prejudice to bringing before trial judge. (fiat) (M)	Hart, J.
Oct. 13	List of additional prospective witnesses for pltfs; c/m 10/12/67	Filed
Oct. 16	Appearance of George E. C. Hayes as associate counsel for pltf.	Filed
Oct. 16	Trial Memorandum, Statement of pltf's claim by defts. c/s 10/16/67	Filed
Oct. 16	Renewal by the pltf to file motion for leave to join Lach Enterprises, Inc., as a party deft, argued and denied as not timely made. (Rep: Joan Blair)	Matthews, J.
Oct. 16	Jury and two alternate jurors sworn; trial begun; respited to October 17, 1967 (Rep: Joan Blair)	Matthews, J.
Oct. 17	Trial resumed; same jury and alternate jurors; respited to October 18, 1967 (Rep. Joan Blair)	Matthews, J.
Oct. 18	Trial resumed; same jury and alternate jurors; respited to October 19, 1967 at 11:00 a.m. (Rep: Joan Blair)	Matthews, J.
Oct. 19	Trial resumed; same jury and alternate jurors; respited to October 20, 1967 (Rep. Joan Blair)	Matthews, J.
Oct. 20	Trial resumed; same jury and alternates; respited to October 23 (Rep: Joan Blair)	Matthews, J.
Oct. 23	Trial resumed; same jury and alternates; respited to October 24, 1967 (Rep. Joan Blair)	Matthews, J.
Oct. 24	Trial resumed; same jury and alternates; respited to October 25, 1967 (Rep. Joan Blair)	Matthews, J.

Brown v. Lamb C.A. No. 1292-63

Date	Proceedings	
1967		
Oct. 25	Trial resumed; same jury and alternates; respited to October 26, 1967 (Rep: Joan Blair)	Matthews, J.
Oct. 26	Trial resumed; same jury and alternates; respited to October 30, 1967 (Rep: Joan Blair)	Matthews, J.
Oct. 30	Trial resumed; same jury and alternates; respited to October 31, 1967 (Rep: Joan Blair)	Matthews, J.
Oct. 31	Trial resumed; same jury and alternates; alternate jurors discharged; jury begins deliberations; jury excused until Nov. 1, 1967 to resume deliberations. (Rep: Joan Blair)	Matthews, J.
Nov. 1	Jury resumes deliberations; verdict for the plaintiff vs. defendant, Edward Oliver Lamb in the sum of $150,000.00 and against defendant, Dispatch, Inc., A Corp. in the sum of $250,000.00 (Rep: M. J. Maloney)	Matthews, J.
Nov. 1	Verdict and judgment for the plaintiff vs. defendant, Edward Oliver Lamb in sum of $150,000.00 and for the plaintiff vs defendant Dispatch, Inc., A Corp. in sum of $250,000.00 (X)	Matthews, J.
Nov. 1	Notes (3) from jury	Filed
Nov. 3	Motion of defts'. for Judgment N.O.V. or in the alternative for a new trial; P & A; c/m 11/3/67; M.C.	Filed
Nov. 8	Transcript of proceedings, 10/17/67, Volume 1, pages 1 through 161 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/18/67, Volume 2, pages 162 through 349 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/19/67, Volume 3, pages 350 through 479 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/20/67, Volume 4, pages 480 through 597 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/23/67, Volume 5, pages 598 through 708 (Rep: Joan Curtis Blair (Court's Copy	Filed
Nov. 8	Transcript of proceedings, 10/24/67, Volume 6, pages 709 through 856 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/25/67, Volume 7, pages 857 through 1025 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/26/67, Volume 8 pages 1026 through 1151 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 8	Transcript of proceedings, 10/30 and 31/1967, Volume 9 pages 1152 through 1337 (Rep: Joan Curtis Blair) Court's copy	Filed
Nov. 13	Supplemental P & A of defendant in support of motion for judgment N.O.V.; c/m 11/10/67	Filed
Nov. 14	Points and authorities of pltf in opposition to motion for judgment Non Abstante Veridicto or for new trial; c/m 11/14/67	Filed
Nov. 17	Instructions of pltf. (6)	Filed
Nov. 17	Instructions of defts. (3)	Filed

Brown v. Lamb C. A. No. 1292-63

Date	Proceedings	
1967		
Nov. 17	Memorandum by defts of P&A in support of motion for directed verdict; c/s 10/30/67	Filed
Nov. 17	Special interrogatories #1, #2 & #3	Filed
Dec. 22	Order granting defts' motion for judgment non obstante verdicto & if judgment is vacated or reversed, a new trial is granted. (X)	Matthews, J.
1968		
Jan. 18	Notice of appeal by pltf form order of 12/22/67 Deposit $5.00 by Burke; copy mailed to N. Meyer Baker	Filed
Jan. 30	Cost bond on Appeal of Pltf. in sum of $250.00 with National Surety Corp.	Sirica, J.
Feb. 9	Exhibits 1, 2, 4, 7, 8, 11, 12, 13, 21, 22, 26, 27, 28, 37, 38, 50, 51, 52, 53, 54, 55A, 55B, 55c, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 71 through 76, by plaintiff,	Filed
Feb. 12	Exhibits 5, 6, 9, 10, 14, 15, 16, 17, 18, 19, 23, 24, 29, 30, 31, 32, 32A through 32K, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46 47, 48, 49, 67, 68, 69, 70, 77, 79 of plaintiff	Filed
Feb. 12	Transcripts of official Court Reporter, Jean Curtis Blair, Vol. -I, Vol.-II, Vol.-III; Vol.-IV; Vol.-V; Vol.-VI; Vol.-VII; Vol.-VIII; Vol.-IX; Vol.-X	Filed
Feb. 14	Exhibits 4, 5, 8, & 9 by deft.	Filed
Feb. 23	Record on Appeal delivered to USCA: Deposit by Milton M. Burke $2.60	Filed
Feb. 23	Receipt from USCA for Original Record	Filed
May 15	Stipulation that record on appeal include the supplemental record	Filed
May 15	Supplemental record. Extract from rebuttal argument of George Hayes Esq. Jean Curtis Blair, Reporter, Court's copy.	Filed
May 15	Supplemental Record on Appeal delivered to USCA: Deposit by Milton M. Burke 50¢	Filed
May 15	Receipt from USCA for Supplemental record	Filed
1969		
Aug. 13	Certified copy of judgment of USCA affirming judgment; opinion attached	Filed
Aug. 13	Bill of costs as taxed by clerk USCA in sum of $659.21	Filed
Oct. 10	Transmittal sheet from USCA returning original record to U.S.D.C (2 vols.-1 box transcripts and exhibits)	Filed
Nov. 14	Request from USCA for return of case	Filed
Nov. 17	Receipt from USCA for return of the original and supplemental record for transmittal to the Supreme Court File	Filed
June 9	Transmittal sheet from USCA returning original record with one box of reporters transcripts and exhibits and original supplemental record and reporters transcript.	Filed
June 29	Exhibits of plaintiff one book, newspaper and one envelope disposed of per Executive Order 52-63	Filed
Oct. 26	Disposal of exhibits of deft. (one envelope) disposed of as for EO 52-63	Filed

Supreme Court, U. S.
FILED
SEP 10 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1979

No. 79-219

EDWARD O. LAMB, *et al.*,
Petitioners,

vs.

RUSSELL MORTON BROWN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS FOR THE SIXTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

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Toledo, Ohio 43624
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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

Supreme Court of the United States

October Term, 1979

No. 79-219

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO AND THE OHIO COURT OF APPEALS FOR THE SIXTH DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

QUESTIONS PRESENTED

1. Whether a writ of certiorari may issue to review a ruling, the law of which, because of a previous election not to seek review in this Court, had become the final and established law of the case?

2. Whether a judgment entered for the defendant on the basis of the forum's statute of limitations is denied Full Faith and Credit when the same claim for relief is about to be heard in another forum where the statute of limitations has not run?

STATEMENT OF THE CASE

On April 28, 1959, Russell Morton Brown filed this action against Edward G. Lamb and others. The action is for attorney's fees which Brown claims for services rendered over the five (5) year period from 1953 through 1957. Brown had represented Lamb in proceedings before the Federal Communications Commission that were prompted by Lamb's alleged affiliation with the Communist Party.

A Motion to Strike the petition was granted, but the Court of Appeals reversed. The Supreme Court of Ohio declined review, and the case was remanded to the trial court for further proceedings.

On May 21, 1963, because the action had sat idle in the Common Pleas Court for almost four years, Brown filed a second action in the United States District Court for the District of Columbia demanding judgment for the same attorney's fees that are the subject matter of the Ohio action. The District of Columbia suit proceeded to trial. The jury returned a verdict for Brown in the amount of Four Hundred Thousand Dollars ($400,000.00). The District Court, however, granted a defense Motion for Judgment n.o.v. on the ground that the District of Columbia action had not been filed within the District of Columbia's three year statute of limitations. Brown appealed, but the United States Court of Appeals for the District of Columbia affirmed the judgment n.o.v. suggesting that Brown pursue his Ohio action. *Brown v. Lamb,* 414 F.2d 1210, 1212 (D.C. Cir. 1969). The Supreme Court of the United States denied certiorari. *Brown v. Lamb,* 397 U.S. 907 (1970).

While the District of Columbia action was pending, the Ohio suit was inadvertently dismissed for want of

prosecution. Upon Brown's motion the erroneous dismissal was remedied, and the case was returned to the active list. When the defense moved for reconsideration of the reinstatement, the trial judge ruled that the petition had properly been dismissed because the District of Columbia judgment n.o.v. was res judicata on the claims pending in Ohio. *Brown v. Lamb,* 36 Ohio St. 2d 8, 10 (1973). The trial judge, therefore, again dismissed the petition. Brown again appealed that Order to the Court of Appeals, but the judgment of dismissal was affirmed. The Supreme Court of Ohio, however, reversed the dismissal saying that the dismissal was an "erroneous denial of a day in court to the appellant." *Brown v. Lamb, supra* at 8. The case was once again remanded to the trial court for further proceedings. Upon remand, Brown filed an Amended Complaint, joining additional parties. Lamb filed an Answer to the Amended Complaint.

Lamb then filed an action in the United States District Court for the Northern District of Ohio seeking to enjoin further proceedings in the common pleas court. The action, brought against various court officials as well as against Brown, complained that further prosecution of the state action would deny the constitutionally guaranteed full faith and credit to be given to the District of Columbia judgment. The district court issued a permanent injunction against further proceedings in the Common Pleas Court. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 399 F. Supp. 409 (N.D. Ohio 1975). The United States Court of Appeals for the Sixth Circuit reversed. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 549 F.2d 1052 (6th Cir. 1977). The Supreme Court of the United States denied certiorari on June 13, 1977. *Lamb Enterprises, Inc., et al. v. Kiroff, et al.,* 431 U.S. 968 (1977).

After the federal injunction against further proceedings in the state court was vacated, Lamb filed an Amended

Answer to Brown's Amended Complaint on July 18, 1977. The Amended Answer asserted a counterclaim for declaratory judgment on the question of whether the judgment n.o.v. in the District of Columbia bars plaintiff's contract claim. Defendant moved for summary judgment on the counterclaim. The trial court denied the motion. The Court of Appeals of Lucas County, Ohio dismissed the appeal, and the Supreme Court of Ohio likewise dismissed. Petitioners have sought a writ of certiorari to review the various decisions dismissing the appeals.

In the entire time this controversy has been pending Brown has not had a final adjudication on the merits of his claim against Brown et al. *See Brown v. Lamb,* 414 F.2d 1210, 1212 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *Brown v. Lamb,* 10 Ohio St. 2d 8 (1973).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Law of This Case Has Already Been Established With Finality.

The trial court order which ultimately precipitated the Petition for Certiorari was an order denying defendants' motion for summary judgment urged on the basis of the District of Columbia's judgment n.o.v. in their favor. Petitioners raise the issue of the res judicata/full faith and credit effect to be given that D.C. judgment.

As the trial court below observed in ruling upon the motion for summary judgment, the defendants had raised this very same issue before, specifically in the 1973 appeal to the Supreme Court of Ohio. Aug. 25, 1976 Opinion of Common Pleas Court, Petitioners' Appendix at A17. The Supreme Court of Ohio ruled on that question. *Brown*

v. Lamb, 10 Ohio St. 2d 8 (1973). Petitioner elected not to seek review of the federal constitutional issue in this Court at that time. The trial court below concluded, and this Court in the past has held that an election not to pursue the federal claim to this Court conclusively rendered the highest state court's decision the law of the case. *Brownell v. Chase National Bank,* 352 U.S. 36 (1956); *Angel v. Bullington,* 330 U.S. 183 (1947).

2. The Legal Premise for the Supposed Constitutional Violation Does Not Exist Because the Judgment of the District of Columbia Was Not on the Merits.

Under the full faith and credit clause of the Constitution of the United States, a judgment need be given as much credit as it is given in the forum where the original judgment is rendered. *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 439 (1943). Conversely, no greater effect need be given a judgment than is given it in the jurisdiction where it was rendered. *Board of Public Works v. Columbia College,* 84 U.S. (17 Wall.) 521 (1873); *Robertson v. Pickrell,* 109 U.S. 608, 610-11 (1883).

The District of Columbia judgment, which Lamb once again insists is a bar in this case, was entered on the ground that the action filed in the District of Columbia was commenced after expiration of the District of Columbia's three year statute of limitations. *Brown v. Lamb,* 414 F.2d 1210, 1211 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970). The question of what effect is to be given a judgment such as that is a matter of local law. *See Durfee v. Duke,* 375 U.S. 106, 109-11 (1963); *cf., Chevron Oil Co. v. Huson,* 404 U.S. 97, 111-12 n.2 (1971) (Douglas J., concurring); *Angel v. Bullington,* 330 U.S. 183, 190-91 (1947); *Oklahoma Packing Co. v. Oklahoma G. & E. Co.,* 309 U.S. 4, 8 (1939). This includes the effect to

be given to a judgment rendered on the basis of the statute of limitations of the jurisdiction. *Bell v. Morrison,* 26 U.S. (1 Pet.) 265 (1828). In the District of Columbia, "[t]he statute of limitations operates to extinguish the remedy, . . . but it does not extinguish [the] right." *Cafritz v. Koslow,* 167 F.2d 749, 751 (D.C. Cir. 1948). *See also Talbott v. Hill,* 261 F. 244 (D.C. Cir. 1919); *Paul v. District of Columbia,* 47 App. D.C. 552 (D.C. Cir. 1918); *cf., Universal Airlines v. Eastern Airlines,* 188 F.2d 993, 996 (D.C. Cir. 1951). As a result, the running of the statute of limitations in the District of Columbia does not bar an action on the same claim in another jurisdiction where the statute of limitations has not run. *Hartman v. Time, Inc.,* 166 F.2d 127, 138-39 (3rd Cir. 1948). *Accord, Fricks v. Carroll,* 368 F.2d 329 (5th Cir. 1966). *See generally, Brown v. Lamb,* 414 F.2d 1210 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *Brown v. Lamb,* 36 Ohio St. 2d 8 (1973); *see also, Sack v. Low,* 478 F.2d 360, 363-64 (2d Cir. 1973); *Collins v. Nurre,* 20 Ohio App. 2d 53, 54 (1969).

Quite simply, the District of Columbia judgment n.o.v., based as it was on the District of Columbia statute of limitations, is a judgment extinguishing only the remedy available to the plaintiff in the District of Columbia. The judgment does not extinguish the underlying cause of action and thus does not affect its actionability elsewhere. *See generally,* RESTATEMENT OF JUDGMENTS §49, Comment a at 194-95 (1942):

> A judgment for the defendant may be based upon the ground that the plaintiff is not entitled to maintain an action in the State in which the judgment is rendered and not on a ground which would be applicable to an action in other States. In such a case, the judgment is on the merits to the extent that it will bar the plaintiff from maintaining the merits so far as actions in other states are concerned. Thus, if the plaintiff brings an action to enforce a claim in one State and the defendant sets up the defense that the action is barred by the Statute of Limitations in that State, the plaintiff is precluded from thereafter maintaining an action to enforce the claim in that State. *He is not, however, precluded from maintaining an action to enforce the claim in another state if it is not barred by the Statute of Limitations in that State.*

(Emphasis added).

Because Respondent Brown's claim for relief survives the District of Columbia judgment, that judgment does not operate to bar further proceedings in this case.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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